HJ. YAHYA YUSOFF & ANOR.

v.

HASSAN OTHMAN & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAZAK J
[CIVIL SUIT NO. 390 OF 1977]
11 JULY 1981

ISLAMIC LAW: *Wakaf - Wakaf in favour of children and their issue - Whether valid - Dedication for religious purpose - Wakaf Prohibition Enactment, s. 11 - Administration of Islamic Law Enactment 1978, s. 41.*

The plaintiffs sought to have the wakaf declared unlawful and to remove the caveat lodged by the defendants. The defendants claimed that the wakaf was valid and asked for a vesting order of the land to be made in their favour to hold the land in trust for the descendants of the beneficiaries of the wakaf.

Held:
[1] The beneficial ownership of the land was with the beneficiaries of the defendants the moment the wakaf was declared. They are now entitled under s. 5 of the 1911 Enactment to have it legally transferred to them.

[Plaintiffs' claim denied. Judgment to the defendants on their counterclaim and costs]

Cases referred to:
Shaik Mahomed Ahsanullah Chowdhry v. Amarchand Kundu & Ors. [1889-90] 17 IA 28
Abdul Fata Mahomed Ishak & Ors. v. Russomoy Dhur Chowdry & Ors. [1894-95] 22 IA 76
Fatuma binti Mohamed bin Salim Bakhshuwen & Anor. v. Mohamed bin Salim Bakhshuwen [1952] AC 1
Commissioner for Religious Affairs, Trengganu & Ors. v. Tengku Mariam & Anor. [1970] 1 MLJ 222
Haji Embong bin Ibrahim & Ors. v. Tengku Nik Maimunah & Anor. [1980] 1 MLJ 268
Meer Mohamed Ismail Khan v. Shashti Churn Ghose & Ors. [1892] ILR 19 Cal 412

Legislation referred to:
Administration of Islamic Law Enactment 1978 (Johore), ss. 16, 41
Wakaf Prohibition Enactment 1911 (Johore), ss. 5, 11

Other source referred to:
Principles of Muhammadan Law by Tyabji 2nd Edition, pp. 544, 548, 607
Principles of Muhammadan Law by Verma 4th Edition 1968, pp. 564, 580, 592

For the plaintiffs - Thara Singh Sidhu
For the defendants - Ng Kong Yeam

JUDGMENT

Abdul Razak J:

This claim concerns a wakaf made by the late Dato' Bentara Luar, Johore one Mohamed Salleh bin Perang in favour of his two children named Othman and Kalthom and their issues forever. The Wakaf Deed was made on 20 May 1909. He died on 22 July 1915.

The present claimants are the administrators *de bonis non* of the Estate of the said Dato Bentara Luar. The defendants are the children of the beneficiaries of the said wakaf. The subject of the wakaf is a piece of land known as lot 883 Grant 1072 in the Township of Johore Bahru against which the defendants had lodged a caveat to prevent it from being sold by the plaintiffs. The plaintiffs had sought to remove the caveat before Dato' Syed Othman J. (as he then was) but his Lordship had dismissed the application holding that the parties should first resolve the question of the land's title. The plaintiffs claim that the said Wakaf was unlawful and unoperative by virtue of the laws existing prior and subsequent to their execution. It was further said that the said Dato' Bentara Luar, even if he executed the Wakaf Deed (which was denied) never allowed it to take effect and never intended it should have any effect whatsoever in the light of the law then existing.

For ease of reference the Wakaf Deed of Othman (as translated) is reproduced which states-

> I Mohamed Salleh bin Perang (Dato' Bentara Luar) with sound mind and in the best of health have wakaf a piece of land together with the vegetation thereon , that is the portion of my land in Johore, held under Grant No. 166 dated the 2nd day of Muharram, 1299 Hijrah to my son Othman bin Mohamed Salleh and also down to his son, grandchildren and his generation for ever.

No Wakaf Deed was produced as far as the deceased Kalthom was concerned other than the plan attached to the Wakaf Deed of Othman which showed the other half of the land to belong to her.

The plaintiffs ask that the said land to be sold and the proceeds be distributed among the beneficiaries of the said Dato Bentara Luar in accordance with Muslim law and also that the caveat lodged be removed. The defendants in their defence denied that the wakaf were invalid. They said that they were properly made under the Muslim law and laws of Johore. They counterclaim instead for a declaration to that effect and also that the descendants of the said Othman and Kalthom are the beneficiaries of the wakaf. They ask that a vesting order of the land be made in their favour to hold the land in trust for the descendants of the said Othman and Kalthom.

At the trial the parties conceded that both the wakaf existed but remained at issue on their validity. No evidence was consequently led except that of the Kadhi Besar of Johore in order to produce the Wakaf Deed of Othman. It was conceded also by both parties that earlier the Wakaf Deed was referred to the Majlis Ugama Islam, Johore for its fatwa pursuant to s. 16 of the Administration of Islamic Law Enactment, 1978 and the Mufti of Johore then had ruled that the two wakaf were valid according to Hukum Syarak (Shafii Sect). The letter by the Kadhi Besar to that effect was produced (A34).

The point in issue is therefore confined determining whether the wakaf are in law valid. The history of wakaf and the development of the law at least as far as those that existed before 1911 (the relevance of which date shall be referred to later) centered around at least three principal cases - *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu & Ors.* [1889-90] 17 IA 28 *Abdul Fata Mahomed Ishak & Ors. v. Russomoy Dhur Chowdry & Ors. [1894-95] 22 IA 76* and *Fatuma binti Mohamed bin Salim Bakhshuwen & Anor. v. Mohamed bin Salim Bakhshuwen [1952] A.C. 1)* The underlying ratioable behind them was that a wakaf for the benefit of the settlor's family, children and descendants and for charity only would be valid if there was a substantial dedication of the property to charitable uses at some point of time or valid if the primary object was for the aggrandisement of the settlor's family

and the gift to charity was illusory either because of its small amount or of its uncertainty or remoteness of object. These decisions were followed by our own courts in *Commissioner for Religious Affairs, Trengganu & Ors. v. Tengku Mariam & Anor [1970] 1 MLJ 222* and *Haji Embong bin Ibrahim & Ors. v. Tengku Nik Maimunah & Anor [1980] 1 MLJ 268* where it was held nevertheless that the avenue for providing for such wakaf was by way of legislation. In India such legislation was made by the Mussalman Wakaf Validating Act VI of 1913 and 1930. In this country it was provided in Trengganu by the Islamic Wakaf Validating Enactment 10 of 1972. It enacted that the wakaf to the settlor's family was not invalid as long as there was an ultimate gift to charity.

What however was the situation in Johore at the relevant time? As one would observe the Privy Council cases governing the above principles were decided before 1911. In 1911 however the Johore Legislation passed the wakaf Prohibition Enactment, 1911 to deal with wakaf land in Johore before and after the Enactment. It had incidentally never been repealed. Its citation reads "To prohibit certain Disposition of Land." It was a short but comprehensive piece of legislation. For our purpose the relevant section is s. 4 which reads as follows-

> 4. If, at any time prior to the commencement of this Enactment, any land shall have been declared to be tanah wakaf other than for such public or charitable purpose, the ownership thereof shall, as from the commencement of this Enactment, be deemed to vest exclusively in the person or persons beneficially entitled to the rents and profits thereof; and every such person shall, to an extent proportionate to his interest in such rents and profits, be deemed to have a permanent, transmissible and transferable right in such land. (The emphasis is mine).

The 1911 Enactment had not defined what a wakaf meant. It seems to assume that the meaning was generally understood and accepted. The law governing wakaf in Johore is now laid down by the Johore Administration of Islamic Law Enactment, 1978 which applies to all wakaf made before or after it and (by the canon of construction) to the extent where this is not inconsistent with the 1911 Enactment, to the latter Enactment also. Under s. 41 therein a wakaf is defined as "a dedication in perpetuity any portion thereof by the owner for religious purposes in accordance with Hukum Syarak." One must necessarily assume therefore that in passing the said Enactment (1911) the Johore legislation was aware of the then prior state of wakaf law governing it with particular reference to the Privy Council decisions hereinbefore stated. Thus by providing in the said Enactment that

> ... any land shall have been declared to be tanah wakaf other than for some public or charitable purpose the ownership thereof shall as from the commencement of the Enactment be deemed to vest exclusively in the person or persons beneficially entitled to the rents and profits thereof...(the emphasis is mine)

the necessary construction and implication must be that the Johore legislature in passing the said Enactment had effected merely to overcome the prohibitions imposed by the Privy Council decisions and the principles therein enunciated by providing that as far as the State was concerned two types of wakaf were recognised before 1911 i.e. a public wakaf with a charitable purpose and one not necessarily charitable and necessarily private but religious, the latter essentially bringing within its compass therefore those private wakaf made exclusively to individuals and to members of the settlor's family but for the lack of clear charitable intention the Privy Council decisions had held to be invalid but which the 1911 Enactment had effected to validate because it was no longer required in those types of cases that the ingredient of charity be necessarily present and paramount as long as it was religious. In my view the 1911 Enactment was only giving recognition once more to the

traditional concept of Islam that the giving of wakaf to one's family is itself a religious act as being the prerequisite of a wakaf although it is not necessarily charitable. That eminent Islamic scholar Ameer Ali J. in *Meer Mahomed Ismail Khan v. Shashti Churn Ghose & Ors.[1892] ILR 19 Cal 412* in propounding the theory of wakaf said that the Prophet Mohamed himself had said that

> A pious offering to one's family to provide against their getting into want is more pious than giving alms to beggars. The most excellent of sadakah is that which a man bestows upon his family.

This case was cited in Abdul Fata Mahomed Ishak case cited above.

Coming back to our case, the Mufti of Johore is ruling in favour of the present wakaf had endorsed the traditional view. The Mufti was giving the authoritative view under the statute, of the Syariah Law, which in my humble view must be accepted in the absence of a contrary view. The present wakaf is within the definition of the Johore Administration of Islamic Law Enactment, 1978 as one benefiting a specific person or group of persons - (see s. 41). It is important to note that under the section a wakaf is defined as a dedication for religious purposes. It does not include as its object charitable purpose (the emphasis is mine). Thus for the reasons above stated s. 41 of the Johore Administration of Islamic Law Enactment, 1978 and s. 11 of the Wakaf Prohibition Enactment made a wakaf dedicated to one's family valid.

It was contended for the plaintiffs that the wakaf for the land had no effect because the title were issued in 1911 whereas the wakaf was made in 1909. But a wakaf is complete by its declaration and it is not necessary that a Mutawalli (a manager) be appointed and possession delivered. It operates to transfer the property from the settlor to the implied ownership of God (see Principle of Muhammadan Law by Tyabji 2nd Edition pp. 544 at 548). It then becomes irrevocable (see Muhammadan Law by *Verma* 4th Edition 1968 p. 564).

The wakaf in the instant case was thus completed as soon as the late Dato Bentara Luar made the Wakaf Deed in 1909 declaring the land therein to be subject to wakaf to his two children. It was further contended that there was no intention on the part of Dato Bentara Luar to create the wakaf because he had acted inconsistently by deriving profits from the land from his own purpose and by charging it. But the taking of profit from the land for the settlor's own purpose is not necessarily inconsistent with a Wakaf Deed because the reservation of the income in favour of the settlor for his own use during his life time is valid (see Ameer Ali J. in his judgment at p. 412 (*supra)*). The rationale of this was also stated by *Verma* (at p. 580) that the settlor's debt may be paid from the income of his property and that he may be maintained from it. He said this was not contradictory with the concept of a valid wakaf provided the corpus of the property was definitely and finally appropriated to the intended purpose, that is to the services of God. In any event once the wakaf is complete it cannot be challenged on the ground that it was not intended or not acted upon (*Verma's* at p. 592). A settlor's right becomes extinguished immediately with his declaration and neither he nor anybody else can say that when he made the declaration he had no intention to create a valid dedication (Ameer Ali J. at p. 434 (*supra)*. In any case even if there was any derogatory act on the part of the settlor this would merely show that he had acted on breach of the wakaf: it did not necessarily indicate he had no intention to create it in the first place.

It was true also, as pointed out by Counsel, as indicative of the supposed lack of intention, that the registered proprietor of the land had always remained with the Dato' Bentara Luar. But it cannot be denied also that the beneficial ownership of the land was with the beneficiaries of the defendants the moment the wakaf was declared which they are now entitled under s. 5 of the 1911 Enactment to have it legally transferred to them. Indeed, as contended by counsel for the defendants it could not have been the intention of the Dato Bentara Luar to transfer the registered proprietorship to the beneficiaries as this would have defeated his intention to allow his descendants to derive profits and income only from it forever. During his lifetime he would be holding the land essentially as *Mutawall*i as the settlor may employ himself as such (see *Tyabji* p. 607). The defendants had not chosen to apply to vest the land in them earlier because clearly their right to the land had not been disturbed by the plaintiffs. They are now compelled to do so because the plaintiffs are seeking to assert their title to the land.

I would therefore dismiss the plaintiffs' claim and give judgment to the defendants on their counterclaim and costs.

Also found at [1981] CLJ 127